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No. 21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JAMES B. CAREY, as President of the INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

JOHN F. HUNT, JR.,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Attorney for Respondent

JAMES F. SMITH,
3 Gateway Center,
Pittsburgh 30, Pa.

CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Of Counsel.

September 27, 1963

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATUTE INVOLVED	1
QUESTION PRESENTED	2
COUNTER STATEMENT	2
I. THE AGREEMENT	3
II. THE GRIEVANCE	3
III. THE HOLDING BELOW	6
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. THIS CASE IS NOT FORECLOSED BY PRECEDENT: THIS COURT HAS THUS FAR ONLY DECIDED THAT SECTION 301 PERMITS CONTRACT ACTIONS EVEN THOUGH THE ALLEGATIONS OF THE COMPLAINT CHARGE AN UNFAIR LABOR PRACTICE UNDER SECTION 8(a)(3)	10
II. THE UNDERLYING GRIEVANCE HERE SEEKS TO EXPAND THE UNIT FOR WHICH IUE HAS BEEN CERTIFIED AND TO SHRINK THE UNIT FOR WHICH FEDERATION HAS BEEN CERTIFIED IN DEROGATION OF THE STATUTORY RIGHTS OF THE AFFECTED EMPLOYEES	13
III. THE INSTANT DISPUTE CAN BE FULLY RESOLVED BY PROCEEDINGS UNDER SECTION 9	17

PAGE

IV. ALL THE POLICIES OF THE ACT BEARING ON THIS CASE SUPPORT THE RESULT BELOW 20

A. The Rights of the Engineering Laboratory Employees and Respondent's Pervasive Duty of Neutrality: Sections 7, 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1) and 8(b)(2) 21

B. The Duty to Bargain Collectively with the Majority Representative of an Appropriate Unit of Employees: Sections 8(a)(5) and 8(b)(3) 23

C. The Cornerstone of the Labor Relations Scheme of the Act Creating an area in which NLRB's Dispute Resolving Jurisdiction Preempts a Collective Bargaining Agreement Arbitration: Section 9 24

D. Special Implications as to Representation Disputes: Section 10(a) 32

E. Congressional Mandate for Protection of Employers and for Final and Binding Resolution of Inter-Union Disputes: Sections 8(b)(4), 10(k) and 303 32

F. Encouragement of Final and Binding Settlement of Inter-Union Disputes by Agreement between the Rival Unions: Sections 201, 203(d) and 301(a) 36

V. THE PRE-EMPTION CASES SUPPORT THE RESULT BELOW 38

A. The Principle Underlying "Pre-emption" Cases 38

B. The Pre-emption Doctrine and Section 301. 39

C. Factors Relevant to Whether Congress Intended NLRB Exclusivity 42

1. Adjudications of Status under the Act Consistently Held Within Exclusive Jurisdiction of NLRB 42

PAGE

2. Adequacy of Administrative Remedy Supports Inference that Dispute Within Exclusive Jurisdiction of NLRB 43

3. Interest of Other Institutions in Ordering Conduct in Labor Dispute Bears on Congressional Intention as to NLRB Exclusivity 43

4. Attitude of NLRB toward Exercise of its Jurisdiction Irrelevant to Whether such Jurisdiction Exclusive 44

D. The Foregoing Criteria Support a Strong Inference that Congress Intended the Instant Dispute to be Determined Solely by NLRB 44

CONCLUSION 45

APPENDIX

TABLE OF AUTHORITIES

JUDICIAL AND ADMINISTRATIVE DECISIONS

AFL v. *NLRB*, 308 U. S. 401 (1940) 24

Allen-Bradley Local No. 1111, United Electrical Workers v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942) 44

Amalgamated Meat Cutters, 101 N. L. R. B. 181 (1952) 20

Amalgamated Meat Cutters Union v. *Fairlawn Meats, Inc.*, 353 U. S. 20 (1957) 20, 44

Anheuser-Busch Inc., 116 N. L. R. B. 1988 (1956) 19

Atkinson v. *Sinclair Refining Co.*, 370 U. S. 238 (1962) 12

Bell Telephone Co. of Pennsylvania, 118 N. L. R. B. 371 (1957) 26

Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U. S. 767 (1947) 42

PAGE

Borg-Warner Corp., 113 N. L. R. B. 152 (1955) 19

Carey v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963) 11

Chrysler Corp., 129 N. L. R. B. 407 (1960) 19

Cleveland Pneumatic Tool Co., 142 N. L. R. B. No. 48, (1963) 20

Combustion Engineering Co., 86 N. L. R. B. 1265 (1949) 23

Douds v. *Int'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957), *Int'l Longshoremen's Ass'n*, 118 N. L. R. B. 1481 (1957) 15

Dowd Box Co. v. *Courtney*, 368 U. S. 502 (1962) ... 12

Employing Plasterers Ass'n of the District of Columbia, Inc., 118 N. L. R. B. 17 (1957) 19

Enterprise Ass'n of Pipefitters, Local 638, 136 N. L. R. B. 1641 (1962) 18

Freight Drivers and Helpers v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961) 11

Garner v. *Teamsters Union*, 346 U. S. 485 (1953) .. 43

Gas Service Company, 140 N. L. R. B. No. 45 (1963) 20

General Aniline & Film Corp., 89 N. L. R. B. 467 (1950) 19

General Electric Co., 144 N. L. R. B. No. 21 (1963) .. 18

Glaziers Local 1778, Brotherhood of Painters, 137 N. L. R. B. 975 (1962) 18

Guss v. *Utah Labor Relations Board*, 353 U. S. 1 (1957) 44

Haspel v. *Bonnoz, Singer & Hand Embroiderers Union*, 112 F. Supp. 944 (S. D. N. Y. 1953) 33

Houdaille Industries, Inc., 35 Lab. Arb. 455 (1960) 31

ILGWU v. *NLRB*, 366 U. S. 731 (1961) 22

Incres Steamship Co. v. *I. M. W. U.*, 372 U. S. 24 (1963) 40

Int'l Ass'n of Machinists v. *Gonzales*, 356 U. S. 617 (1958) 43

PAGE

Int'l Chemical Workers Union v. *Olin Mathieson Chemical Corp.*, 202 F. Supp. 363 (S. D. Ill. 1962) 11
Int'l Hod Carriers Union, Local 231, 91 N. L. R. B. 598 (1950) 29
Int'l Longshoremen's & Warehousemen's Union, 94 N. L. R. B. 388 (1951) 29
Int'l Longshoremen's & Warehousemen's Union v. *Juneau Spruce Corp.*, 342 U. S. 237 (1952) 33
Internat'l Union, U. A. W. v. *Wisconsin Employment Relations Board*, 336 U. S. 245 (1949) 44
Lacrosse Tel. Corp. v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949) 42
Leedom v. *Kyne*, 358 U. S. 184 (1958) 24
Local 3, Metal Polishers Union, 142 N. L. R. B. No. 48 (1963) 19
Local 26, Int'l Fur Workers, 90 N. L. R. B. 1379 (1950) 20
Local 174, Teamsters Union v. *Lucas Flour Co.*, 369 U. S. 95 (1962) 12
Local No. 207, Int'l Ass'n of Bridge Workers Union v. *Perko*, 373 U. S. 701 (1963) 42
Local 825, Int'l Union of Operating Engineers, 137 N. L. R. B. 1425 (1962) 29
Local 991 Int'l Longshoremen's Ass'n, 137 N. L. R. B. 750 (1962) 19
Local 1357, Retail Clerks Int'l Ass'n v. *Food Fair Stores, Inc.*, 202 F. Supp. 322 (E. D. Pa. 1961) .. 11
Local 1505 Int'l Brotherhood of Electrical Workers v. *Local Lodge No. 1836 of Dist. 38 of the Ass'n of Machinists*, 304 F. 2d 365 (1st Cir. 1962) 10, 42
Local 1622, United Brotherhood of Carpenters, 139 N. L. R. B. No. 43 (1962) 18
Lodge 12, Int'l Ass'n of Machinists v. *Cameron Iron Work, Inc.*, 257 F. 2d 467 (5th Cir. 1958) 10, 11
Long Island News Corp., 35 Lab. Arb. 840 (1960) .. 31

PAGE

Madison Glass Specialty Co., Inc. v. *Display Fixture, Smoking Pipe, Plastics and Production Workers Union*, 43 Lab. Cas. Par. 17,086, 146 N. Y. L. J., July 3, 1961 (Sup. Ct., N. Y. Cty.) 11

Marine Engineers Beneficial Ass'n v. *Interlake Steamship Co.*, 370 U. S. 173 (1962) 28, 42

Midwest Conveyor Company, Inc., 116 N. L. R. B. 580 (1956) 19

Midwest Piping and Supply Co., 63 N. L. R. B. 1060 (1945) 25

National Steel & Shipbuilding Co., 40 Lab. Arb. 625 (1963) 31, 38

Nepco Unit of Local 95, Office Employees Int'l Union v. *Nekoosa-Edwards Paper Co.*, 287 F. 2d 452 (7th Cir. 1961) 14

Newark & Essex Plastering Co., 121 N. L. R. B. 1094 (1958) 20

New York Mailers' Union v. *New York Times*, 43 Lab. Cas. Par. 17,309, 146 N. Y. L. J. October 28, 1961, p. 12 (Sup. Ct., N. Y. Cty.) 11

New York Mailers' Union v. *Publishers' Ass'n of New York City*, 43 Lab. Cas. Par. 17,310, 146 N. Y. L. J., Nov. 28, 1961, p. 13 (Sup. Ct. N. Y. Cty.) 11

N. L. R. B. v. *Radio and Television Broadcast Engineers*, 364 U. S. 573 (1961) 35

N. L. R. B. v. *United Ass'n of Journeymen and Apprentices of the Plumbing Industry*, 242 F. 2d 722 (3d Cir. 1957) 19

Novak Logging Co., 119 N. L. R. B. 1573, 1574 (1958) 25

Pacific Tile and Porcelain Co., 137 N. L. R. B. 1358 (1962) 30

Pittsburgh Plate Glass Co. v. *NLRB*, 313 U. S. 146 (1941) 24

Plumbing Contractors Ass'n of Baltimore, 93 N. L. R. B. 1081 (1951) 19

PAGE

Printer's Pressmen's Union, 143 N. L. R. B. No. 24 (1963) 18

Raley's Inc., 143 N. L. R. B. No. 40 (1963) 16, 29
Rayonier, Inc., 36 L. A. 883 (1961) 31
Retail Clerks v. *Schermerhorn*, 373 U. S. 746 (1963) 40
Retail Clerks Union v. *Thriftimart, Inc.*, 30 Cal. Rep. 13, 280 P. 2d 652 (1963) 11

San Diego Building Trades Council v. *Garmon*, 359 U. S. 236 (1959) 9, 40
Smith v. *Evening News Ass'n*, 371 U. S. 195, 197-98 (1963) 6, 10, 11, 12, 40, 41, 42
Spielberg Mfg. Co., 112 N. L. R. B. 1080 (1955) 29

Textile Workers v. *Lincoln Mills*, 353 U. S. 448 (1957) 12, 31

UAW, Local 291, 92 N. L. R. B. 968 (1950) 23
UAW v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1956) 44
United Construction Workers v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954) 43
United Steelworkers of America v. *American Mfg. Co.*, 363 U. S. 564 (1960) 12
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 12
United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) 12

Weber v. *Anheuser-Busch Inc.*, 348 U. S. 468 (1955) 44
Westinghouse Electric Corp., 144 N. L. R. B. No. 49 (1963) 18

STATUTES

PAGE

Labor Management Relations Act, 1947, 61 Stat. 136 *et seq.*, *as amended* 29 U. S. C. §§ 141 *et seq.* (Supp. 1959-60), 29 U. S. C. A. §§ 141 (Supp. 1960) *et seq.*

§ 7 ..... 7, 14, 16, 19, 21, 22, 39
§ 8 ..... 7, 39
§ 8(a)(1) 21, 22
§ 8(a)(2) 21, 22
§ (a)(3) 7, 10, 21
§ 8(a)(5) 23, 32
§ 8(b)(1) 21, 22
§ 8(b)(2) 21, 22
§ 8(b)(3) 23, 32
§ 8(b)(4) 9, 15, 32, 33, 34, 35
§ 9 ..... 7, 8, 15, 17-22, 24, 25-27, 30, 32
§ 10(a) 32
§ 10(k) 9, 18, 19, 20, 32, 33, 34, 35, 36
§ 201 ..... 9, 36, 37
§ 203(d) 36, 37
§ 301 ..... 6, 7, 9, 12, 25, 33, 34, 36, 37, 38, 39, 40
§ 303 ..... 9, 32, 33

TEXTUAL MATERIALS

Summers, *Labor Law Decisions of the Supreme Court 1962 Term*, Daily Labor Report No. 168 (August 28, 1963) 39

Recent Cases, 71 Harv. L. Rev. 1364 (1958) 20

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JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,
v.
WESTINGHOUSE ELECTRIC CORPORATION
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No. 21

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

Statute Involved

In addition to the sections of the Labor Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136-62, as amended by Act of September 14, 1959, 73 Stat. 525-45, 29 U. S. C. Sections 141 *et seq.*, hereinafter referred to as the Act) cited by petitioner (who is suing in his capacity as President of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE)) in his brief (PB), respondent submits that the following sections of the Act are involved in this case: Sections 7, 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1), 8(b)(2), 8(b)(3), 8(b)(4)(B), 8(b)(4)(C), 303(a)(3), 303(a)(4) and 303(b). Those additional sections are set forth in an appendix.

Question Presented

In an action governed by Section 301 of the Act, where

(i) a union seeks to enforce against an employer a clause of their collective bargaining agreement which obligates the employer to submit to arbitration unsettled grievances involving the interpretation, application or claimed violation of the agreement,

(ii) the unsettled grievance in question is a claim by the union that, in respect of a particular department at one of employer's plants, the employer has violated a clause of the agreement which requires that the union be recognized for those units where through a lawful NLRB certification it has been lawfully designated as exclusive bargaining representative,

(iii) a rival union, which presently represents the employees of such department, has a collective bargaining agreement with the employer which has a similar arbitration clause and a similar recognition clause and

(iv) NLRB has found appropriate two mutually exclusive bargaining units at the plant in question and has certified the complaining union for one such unit and the second union for the other,

should not the court requested to enforce the arbitration clause first referred to decline to do so, leaving the dispute to resolution by NLRB in a manner binding on the two rival unions?

Counter Statement

Respondent accepts petitioner's statement of *"The Proceeding"* below. Respondent would supplement and/or

correct petitioner's statement as to *"The Agreement"*, *"The Grievance"* and *"The Holdings Below"*.

I. THE AGREEMENT

The arbitration clause of the collective bargaining agreement between IUE and respondent (the IUE Agreement) (Section XIV-A, pp. 41-45, of the instrument bound into the Record at page 77) recognizes that (i) not all grievances subject to the contractual grievance machinery (Section XIV) will be arbitrable, (ii) in the event of a dispute over arbitrability the decision of a court should be controlling and (iii) pending such decision, arbitration should not be proceeded with. See Paragraph C(5) of Section XIV-A, p. 43. The IUE Agreement further provides that if there be an unsettled dispute which is not arbitrable (or, indeed, if the employer should even question arbitrability) the union shall be free to authorize a strike notwithstanding the general "no strike" clause. See Section VI-B, p. 4. The recognition clause (Section I, pp. 1-2) is stated as an obligation to recognize the union "for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative . . ." and sets forth such units in an appendix. The production and maintenance unit at respondent's Baltimore Works is set forth as Item 1 of such appendix, p. 90.

II. THE GRIEVANCE

The employees at issue in the grievance are those who work in the engineering laboratory at respondent's Baltimore Works (Rec. 29, ff. 69-70). At all relevant times they have been represented by, and are largely members of, Federation of Westinghouse Independent Salaried Unions

(Federation) (*ibid.*) which is the certified bargaining representative of a unit at that plant (Rec. 27, f. 70) determined by NLRB to consist of "All salaried, technical, office and office clerical employees . . . but excluding . . . all production and maintenance . . . employees" (Rec. 30, f. 72). Federation was certified by NLRB as a result of an election in which the then engineering laboratory employees voted (and they did not vote in the production and maintenance unit election which resulted in certification of IUE) (Rec. 27-29, ff. 67-69).

The collective bargaining agreement between respondent and Federation (the Federation Agreement) contains a recognition clause identical with that of the IUE Agreement except, of course, for the unit descriptions in the appendices (Rec. 30-31, ff. 71-72). The Federation Agreement also contains an arbitration clause in all material respects identical with the arbitration provisions of the IUE Agreement (*ibid.*).

The engineering laboratory is a department of the Baltimore Works which develops experimental models and pilot equipment and, accordingly, some of its workmen have job descriptions generally similar to those found on the production line (Rec. 26-27, f. 66). However, a laboratory machinist must possess a greater degree of skill and knowledge than a production line machinist (*ibid.*).

As the IUE and Federation Agreements show, IUE's and Federation's respective unit definitions and the recognition clauses of their respective collective bargaining agreements with respondent are *mutually exclusive*. Petitioner's production and maintenance unit specifically excludes all salaried technical workers and Federation's salaried technical unit specifically excludes all production and maintenance workers. Respondent has always treated the employees of the Baltimore Works departments as in the IUE unit or

the Federation unit on the basis of whether the then employees of such departments voted in the IUE election or the Federation election (Rec. 28-29, f. 69).

It is also clear from the language of those recognition clauses that there was no bargaining with either rival union in respect to respondent's recognition obligations. Both recognition clauses simply refer to units which the unions are statutorily entitled to represent and in respect of which respondent is statutorily obligated to recognize the unions. Furthermore, consistent with the statutory significance of NLRB certifications, those recognition clauses do not purport to assign work, but only to describe the classes of employees covered by the respective collective bargaining agreements. This is the scheme of representation and the type of collective agreement long established in industrial unionism, as distinguished from the scheme of craft unionism and the type of collective agreement found, for example, in the construction trades.

Petitioner's introduction (PB 4-5) to the quotation of the original grievance is not supported by the quotation itself, for the grievance did not protest respondent's refusal to apply the IUE Agreement "to the performance of work on induction heating [etc.]" but to "the employees working on induction heating [etc.]". Furthermore, IUE never claimed, prior to the petition for certiorari, that the grievance was a work assignment grievance, but consistently described it as a protest of respondent's refusal to apply the IUE Agreement to the engineering laboratory employees; see Rec. 12, f. 24, 14, f. 27, 16, f. 40, 35, f. 103 (affidavit to Special Term of an IUE vice-president: the grievance "merely involves a violation by the Company of the rights of the Union to represent the employees who perform production and maintenance work . . ."). The thrust of the grievance, according to a sworn statement of

an IUE officer, was not to alter the identity of the people working in the engineering laboratory, but a charge that respondent had transferred workers from the production line to the laboratory and that such transferred workers should have "the benefits of the [IUE] contract" (Rec. 36, f. 104). This plainly means that those workers should be included in the IUE unit and that they should be represented by IUE for collective bargaining purposes rather than by Federation. Petitioner's present attempt to convert the grievance into a demand for more work for people it presently represents is not only not supported by the record it is impeached by facts made of record by petitioner.

The brief of the United States as *amicus curiae* (SGB) agrees that the grievance raises a "dispute over questions of representation requiring more precise definition of the bargaining unit" (SGB 14).

III. THE HOLDING BELOW

The New York courts at all three levels confirmed that the grievance sought to enlarge the IUE bargaining unit at the expense of Federation (Rec. 47, f. 124, 48-49, f. 125-26, 58, f. 142, 66, ff. 154-55—and the dissenting opinions recognized this as the nature of the grievance, Rec. 60, f. 146 and 68, f. 156). Indeed, the nature of the grievance was not even in issue in the New York Courts, petitioner himself treating the contract interpretation issue he was asserting as raising matters of representation and unit definition.

SUMMARY OF ARGUMENT

Existing decisions of the Court under Section 301 of the Act do not foreclose the issue in this case. *Smith* v. *Evening News Association*, 371 U. S. 195 held that a claim of breach of a collective bargaining agreement may be en-

forced under Section 301 even though the challenged conduct would also constitute an unfair labor practice cognizable by NLRB under Section 8(a)(3), but the Court expressly reserved decision as to agency exclusivity in other situations.

The grievance in issue here, however phrased or rephrased, seeks to "clarify" the unit of employees in respect of which IUE has been certified as bargaining representative to include a class of employees hitherto treated as included in the NLRB determined unit for which Federation has been certified as bargaining representative. If IUE is successful in its grievance it will have obtained representational status in respect of such class of employees without the individuals included in that class having had any voice in the selection of IUE as their bargaining representative. Bilateral arbitration of this grievance under the collective bargaining agreement between IUE and respondent cannot be a final and binding resolution of the dispute for it will bind neither the rival union nor the employees affected. Indeed, such an arbitration award is conducive of further strife and will require further adjudications including ultimate adjudication by NLRB.

Under any phrasing or rephrasing of the instant grievance, the underlying dispute can be effectively resolved by proceedings under Section 9 of the Act. An NLRB determination that the engineering laboratory employees as a class are properly included in the production and maintenance unit will effectively give IUE all the ultimate relief it is entitled to seek and will be effective to exclude such class of employees from the NLRB determined Federation unit.

All relevant policies of the Act speak against the result petitioner seeks.

Sections 7 and 8 accord employees the right to have a voice in the choice of their bargaining representative by

balloting as part of an appropriate unit of employees and require the employer to be completely neutral as between two unions seeking to represent employees. A variety of statutory rights and obligations of employers and of unions depend upon a union's majority status in an appropriate unit of employees, including the fundamental right and duty to be bargained with, and to bargain, collectively.

Section 9 entrusts controversies between two certified unions over the contents and propriety of their respective units to NLRB. Policies favoring voluntary recognition, etc. are inapplicable where, as here, the employer has recognized and bargained collectively with IUE and Federation in respect of their NLRB determined units. Proceedings under Section 9 will result in a final adjudication of the underlying dispute here in a manner binding on both unions and the affected employees and with full protection of employee rights under the Act and full implementation of all other applicable statutory policies. While IUE's success in a Section 9 proceeding would give rise to ancillary collective bargaining agreement problems in respect of the engineering laboratory jobs, any other method of adjudication would foreseeably give rise to an even greater number of disputes and disputes which, should NLRB disagree with the bilateral arbitration award, will prove to have been unnecessary. NLRB cannot fairly defer to a bilateral contract arbitration award in this case because Federation will not have been represented in the arbitration proceedings (and existing NLRB precedent relating to arbitration awards shows that the IUE award could not be deemed to bind Federation). The contract arbitrator here is not bound by NLRB standards established under Section 9 and arbitrators seem to agree that arbitration between one rival union and an employer is not a felicitous method of resolving disputes between two rival unions.

Sections 8(b)(4), 10(k) and 303 evidence a clear policy that employers should not be harassed or prejudiced by inter-union rivalries (and Section 10(k) encourages inter-union agreements and arbitrations in respect of the type of inter-union disputes dealt with by that Section).

Sections 201, 203(d) and 301(a) are relevant here in support of the decision below because they show the Congressional espousal of collective bargaining agreement arbitration to be applicable where, unlike here, such an arbitration would be a final and binding resolution of the basic dispute. The Congressional policy in respect of inter-union disputes favors agreements and arbitration submissions by the two rival unions. Implementation of Congressional policy here would seek to encourage inter-union agreements and arbitration submissions by precluding one union from seeking to gain advantage, however temporary, from an arbitration award against the employer contractually binding the employer to deem IUE's NLRB determined unit to include, and Federation's NLRB determined unit to exclude, the engineering laboratory employees.

The "pre-emption" doctrine, articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 and related cases, establishes that, in certain types of labor situations, it is to be inferred from the Act either that Congress did not intend the conduct involved to be ordered other than by NLRB or that, in light of the overall scheme of the Act, a proper allocation of functions among the various institutions and agencies concerned with labor relations requires that NLRB be the exclusive forum in respect of the conduct involved. Existing pre-emption cases show that the foregoing inferences are warranted when the underlying dispute involves fundamental questions of status under the Act, when the agency remedy provided by the

Act is adequate when the public interest in resolution of the dispute by NLRB outweighs any interest in resolution by the competing institution. Considerations of NLRB workload and its own attitude toward exercise of its jurisdiction are irrelevant. These criteria, applied to the facts of this case, support affirmance of the result below.

ARGUMENT

I. THIS CASE IS NOT FORECLOSED BY PRECEDENT: THIS COURT HAS THUS FAR ONLY DECIDED THAT SECTION 301 PERMITS CONTRACT ACTIONS EVEN THOUGH THE ALLEGATIONS OF THE COMPLAINT CHARGE AN UNFAIR LABOR PRACTICE UNDER SECTION 8(a)(3)

The Court expressly noted in *Smith* v. *Evening News Ass'n*, 371 U. S. 195, 197-98, that, should serious problems arise from situations involving both NLRB and judicial (arbitral) jurisdiction over acts which amount to an unfair labor practice, such problems will be faced as they arise. Since certain "unfair labor practice" grievances were reserved in *Smith, a fortiori,* the situation as to grievances seeking redeterminations of NLRB determined units of employees is an open one.

Prior to *Smith*, and in the face of *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467 (5th Cir. 1958), which anticipates *Smith,* the lower courts consistently held that bi-lateral arbitration of certification disputes would not be ordered in cases governed by Section 301 (and most of such holdings were on the theory that such an arbitration would deprive affected employees of their rights under the Act, increase rather than allay industrial strife and be basically unfair to the employer). See *Local 1505 Int'l Brotherhood of Electrical Workers* v. *Local Lodge No. 1836 of Dist. 38 of the Ass'n of Ma-*

chinists, 304 F. 2d 365 (1st Cir. 1962) (*Raytheon*); *Int'l Chemical Workers Union* v. *Olin Mathieson Chemical Corp.*, 202 F. Supp. 363 (S. D. Ill. 1962); *Local 1357, Retail Clerks Int'l Ass'n* v. *Food Fair Stores, Inc.*, 202 F. Supp. 322 (E. D. Pa. 1961); and *Madison Glass Specialty Co., Inc.* v. *Display Fixture, Smoking Pipe, Plastics and Production Workers Union*, 43 Lab. Cas. Par. 17,086, 146 N. Y. L. J., July 3, 1961 (Sup. Ct., N. Y. Cty.). In the case of work assignment grievances, of the few cases reported, the majority have also held against arbitrability (compare *New York Mailers' Union* v. *New York Times*, 43 Lab. Cas. Par. 17,309, 146 N. Y. L. J. Oct. 28, 1961, p. 12 (Sup. Ct., N. Y. Cty.) and *New York Mailers' Union* v. *Publishers' Ass'n of New York City*, 43 Lab. Cas. Par. 17,310, 146 N. Y. L. J., Nov. 28, 1961, p. 13 (Sup. Ct. N. Y. Cty.) with *Freight Drivers and Helpers* v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961).

Since *Smith*, the Court of Appeals for the Second Circuit in *Carey* v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963) and the California Supreme Court in *Retail Clerks Union* v. *Thriftimart, Inc.*, 30 Cal. Rep. 13, 280 P. 2d 652 (1963), have read that decision as requiring a different result in respect of the facts of those cases (although the latter case vacated the arbitrator's award because it affected, though it did not purport to bind, a third party not privy to the arbitration agreement or the proceedings pursuant to it).

However, commencing in Special Term, respondent has always stipulated (drawing a clear distinction between "unfair labor practice grievances" and "representational grievances") the doctrine of *Cameron Iron Works, supra, viz.*, that a grievance is not non-arbitrable merely because it involves conduct which would also constitute grounds for certain types of unfair labor practice charges before NLRB.

The interpretation of the Act articulated in *Smith* was assumed by the judges below and they nevertheless held the instant grievance non-arbitrable under the circumstances of this case; see Rec. 59, f. 142.

Nor is the present case foreclosed by *Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (§ 301 does not pre-empt state court jurisdiction over actions on collective bargaining agreements), *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95 (state courts must apply federal law in such actions) and *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (employer may sue on no strike clause even though related employee grievances pending arbitration). To be sure, the Court noted in *Lucas Flour* (369 U. S. at 101, n. 9) and *Sinclair* (370 U. S. at 245, n. 5) that the pre-emption doctrine is inapplicable to contract actions, but those remarks were in contexts far removed from the present issue. Indeed, the reservation in the Court's opinion in *Smith* (referred to above) establishes that the present issue is not foreclosed by any existing Section 301 case.

The present issue is one of first impression in this Court, not controlled by *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, the *Steelworkers* cases (*United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593) or any other Section 301 case which implements Congressional policy favoring enforcement of collective bargaining agreements. As the remainder of this brief demonstrates, should a collective bargaining agreement arbitrator be permitted to exercise concurrent jurisdiction with NLRB over the instant grievance, problems of the most serious nature will arise—problems for which no fair and orderly solution is

available. Thus, one of the situations reserved in *Smith* v. *Evening News* must now be resolved and respondent submits that the only resolution consistent with the scheme of the Act is affirmance of the decision below.

II. THE UNDERLYING GRIEVANCE HERE SEEKS TO EXPAND THE UNIT FOR WHICH IUE HAS BEEN CERTIFIED AND TO SHRINK THE UNIT FOR WHICH FEDERATION HAS BEEN CERTIFIED IN DEROGATION OF THE STATUTORY RIGHTS OF THE AFFECTED EMPLOYEES

Both opposing briefs postulate a division of inter-union disputes between "representational" disputes and "work assignment" disputes. On the basis of this compartmentalization both briefs submit that, whether the unsettled grievance here be characterized as a representational dispute or a work assignment dispute, the decision below should be reversed. Respondent submits that, under either of those characterizations or any other characterization, the fundamental nature of the grievance is such that the decision below should be affirmed.

Both opposing briefs recognize (petitioner's brief by its over strong protests) that the "work assignment" thrust to the grievance as it hitherto existed is new wine. But whatever the vintage, it is the old bottle which is relevant to decision here.

Initially, it seems useful to reiterate that, as the brief of the United States agrees (SGB 14), on the basis of the record in this case, the instant grievance seeks an interpretation of the content of the unit for which IUE has been certified, necessarily affecting the content of the unit for which Federation has been certified and necessarily extending IUE's representational status to a new group of employees who have not chosen IUE as their bargaining representative.

Petitioner, however, submits that the grievance should be treated as a work assignment grievance because (i) it could originally have been framed as a work assignment dispute and (ii) shop stewards cannot be expected to plead precisely (citing *Nepco Unit of Local 95, Office Employees Int'l Union* v. *Nekoosa-Edwards Paper Co.*, 287 F. 2d 452 (7th Cir. 1961)).

Precision of "pleading" has never been at issue in this case. The original grievance (presented in 1958) is cited by respondent as only the beginning of a long and consistent chronology which shows that the whole idea that the grievance was attempting to get more work for persons presently in the IUE unit was only introduced in the petition for certiorari (1962). As the record shows, the thrust of the grievance as one of unit definition and enlargement of representational status was understood by both parties for over four years. That understanding was reflected in the petition and supporting affidavits to Special Term (surely not drawn by shop stewards) and, under the reasoning of *Nepco*, the understanding of the parties over the four years in question ought to control the present understanding of the grievance.

In any event, respondent submits that IUE's attempt to re-state its grievance at this time is *irrelevant*. Critical to decision here is the nature of the dispute in terms of the stated objective of the grievance, available remedies under the Act, impingement on the statutory rights of the employees affected, impact on the two rival unions and the employer and the foreseeable consequences of bi-lateral collective bargaining agreement arbitration as opposed to NLRB determination. Neither opposing brief comes to grips with the basic nature of the underlying dispute in terms of the statutory scheme and both opposing briefs significantly omit any reference to Section 7 of the Act and

the statutory rights of the primary legislative beneficiaries —employees.

Notwithstanding petitioner's re-definition of the instant grievance as a "work assignment dispute", according to petitioner's own present articulation of it, it is a grievance in which IUE seeks the application of the IUE Agreement "to the employees and the work" (PB 5). Application of the IUE Agreement to the employees doing the engineering laboratory work means recognizing IUE as their exclusive bargaining agent and ceasing to recognize Federation in respect of such employees. It also means that a group of employees, in existence at the time of IUE's election as representative of the production and maintenance unit, who have never had an opportunity to accept or reject IUE as their bargaining representative (and who have in fact participated in an election which chose Federation as their bargaining representative) will suddenly find themselves represented by IUE. Thus, the objective of the IUE grievance, under the circumstances, is totally repugnant to the policies of the Act. The Act makes it quite clear that (i) the only method by which a union may become the bargaining representative of a class of employees is by having the approval of a majority of employees within an appropriate grouping of employees and (ii) the main criterion for appropriateness of the grouping is whether it assures the employees "the fullest freedom in exercising the rights guaranteed" by the Act (Section 9(b)). The only legal means by which IUE can seek the objective of its grievance is a proceeding under Section 9 of the Act. It would be clearly illegal for IUE to seek this objective by coercion on respondent (Section 8(b)(4)(i)(B)) or by insisting that respondent bargain with it in respect of that objective (*Douds* v. *Int'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957); *Int'l Longshoremen's Ass'n*, 118

N. L. R. B. 1481 (1957)). Nevertheless, IUE now seeks to achieve that objective through an arbitration proceeding under the IUE Agreement, candidly admitting that it is seeking an arbitrator's construction of the recognition clause—an incorporation by reference of NLRB's certification order in respect of the production and maintenance unit.

Furthermore, respondent is obligated by the Act and by the Federation Agreement to deal with Federation in respect of the NLRB determined salaried technical unit and, since NLRB has certified IUE and Federation for mutually exclusive units, respondent can only deal with IUE in respect of the NLRB determined production and maintenance unit. Thus the thrust of the IUE grievance is to seek from an arbitrator under the IUE Agreement a construction of its NLRB determined unit to include the engineering laboratory employees and, necessarily, a construction of the NLRB determined Federation unit to exclude them.

Under any comprehension of the underlying grievance here, the ruling of a contract arbitrator will affect employee rights under Section 7 of the Act and (i) if IUE obtains the award it seeks drive Federation either toward *its* contract arbitrator (facing respondent with conflicting arbitration awards) or to NLRB. The dispute almost unquestionably must eventually come before NLRB and when it does the agency cannot fairly defer to an arbitration award which was rendered in a proceeding to which one of the rival unions was not a party (see the discussion of *Raley's, Inc.*, 143 N. L. R. B. No. 40 (1963), *infra*). When the agency arrives at its conclusion the prior arbitration award will be without further effect (and all ancillary collective bargaining agreement disputes arising from the award petitioner now seeks, such as whether the skills of a present engineering laboratory machinist entitle him to continue at work notwithstanding his lack of seniority vis-a-vis existing production line machinists and how the IUE

Agreement can be applied to engineering laboratory operations and employees in light of the fact that it was negotiated without reference to that department and an established set of applicable customs is lacking) will have to be determined or re-determined on the basis of NLRB's decision.

Under any characterization of the instant grievance, should IUE prevail here and in the arbitration it seeks, unless respondent refuses to abide by the award, (i) Federation will lose and IUE will gain representation without any choice having been exercised by the engineering laboratory employees, (ii) respondent will be subject to an unfair labor practice charge by Federation and/or a demand for arbitration under the Federation Agreement and (iii) the present engineering laboratory employees, if thrown out of work to their financial detriment and that of their families, may bring unfair labor practice charges or damage actions against respondent. During such an interval, the dislocated employees may drift to other industries, with a permanent loss of their skills to their present industry and to the detriment of the efficiency of production at the Baltimore Works. If the dispute were first and finally put to NLRB, in the event of petitioner's success certain of the foregoing consequences could ensue but the resolution would be final and binding on all parties, there would be no interim period of industrial chaos and the resolution would reflect the application of national labor policy and the protection of employee rights by the expert agency chosen by Congress—not an interpretation of the IUE Agreement.

III. THE INSTANT DISPUTE CAN BE FULLY RESOLVED BY PROCEEDINGS UNDER SECTION 9

Since IUE's own statement of its grievance asks that the definition of the production and maintenance unit be deemed to include engineering laboratory employees, it

seems to go without saying that that relief can be had from NLRB under Section 9 (by motion to clarify existing units or by a representation proceeding if the agency should conclude that IUE is seeking a change from the *status quo* at the time of IUE's prior certification or that, because of the number of employees involved, a new election is required; see *General Electric Co.*, 144 N. L. R. B. No. 21 (1963) and *Westinghouse Electric Corp.*, 144 N. L. R. B. No. 49 (1963)).

Nevertheless, petitioner now seems to be contending that, if it were relegated to agency procedures, it could obtain the relief it seeks only by NLRB action under Section 10(k). Conceding, *arguendo*, that what petitioner now seeks is the allocation of work presently performed in the engineering laboratory to people in the production and maintenance unit, it is nevertheless the case that such relief can and, on the present facts, should be had in a Section 9 proceeding.

When a dispute is presented to NLRB under Section 10(k), the agency says that it does not award work to a union or to its members as such, but simply determines that disputed work is properly the function of *a class of employees* represented by a particular union. See, *e.g.*, *Printing Pressmen's Union*, 143 N. L. R. B. No. 24 (1963); *Local 1622, United Brotherhood of Carpenters*, 139 N. L. R. B. No. 43 (1962); *Glaziers Local 1778, Brotherhood of Painters*, 137 N. L. R. B. 975 (1962); *Enterprise Ass'n of Pipefitters, Local 638*, 136 N. L. R. B. 1641 (1962). At the same time, when an inter-union dispute is presented to NLRB under Section 9, the agency articulates its concern as finding an appropriate *class of employees* for purposes of bargaining representation but also states that such a finding does not constitute an assignment of work to, or the freezing of the work or work tasks of, the employees

of the unit in question) see *Employing Plasterers Ass'n of the District of Columbia, Inc.*, 118 N. L. R. B. 17 (1957); *Plumbing Contractors Ass'n of Baltimore*, 93 N. L. R. B. 1081 (1951); *General Aniline & Film Corp.*, 89 N. L. R. B. 467 (1950).

While the distinction referred to is, and is admitted to be, difficult of application (see *NLRB* v. *United Ass'n of Journeymen and Apprentices of the Plumbing Industry*, 242 F. 2d 722 (3d Cir. 1957)), the difficulty either does not arise or is academic when, as here, an alleged work dispute is between two certified unions. In such cases a clarification of unit definitions under Section 9 is both an appropriate and an adequate method of resolving the dispute. This is so because NLRB's decisional approach in Section 9 cases inevitably involves the question of work. See, *e.g.*, *Chrysler Corp.*, 129 N. L. R. B. 407 (1960); *Anheuser-Busch, Inc.*, 116 N. L. R. B. 1988 (1956); *Midwest Conveyor Company, Inc.*, 116 N. L. R. B. 580 (1956) and *Borg-Warner Corp.*, 113 N. L. R. B. 152 (1955). And the agency's approach in Section 10(k) cases between certified units inevitably involves unit coverage. See, *e.g.*, *Local 991 Int'l Longshoremen's Ass'n*, 137 N. L. R. B. 750 (1962) (the work of loading dry resins in special containers aboard ship from plant dock assigned to plant's production and maintenance unit, rather than longshoremen's unit which had work of loading resins before containerization; NLRB observing that, had container dock been in operation at the time of production and maintenance unit certification, employees working at the dock would have been included in that unit). Similarly, work assignments as between certified unions involve their representational status and the rights of employees under Section 7. *Local 3, Metal Polishers Union*, 142 N. L. R. B. No. 48 (1963) (dispute between Metal Polishers and Employees Association as to

the assignment of "snagging"; employer's contract with latter purported to cover snaggers but provided no job description and the actual job eventually became indistinguishable from skilled work done by metal polishers; NLRB concluded that single unit of metal polishers and snaggers was appropriate, a Section 9 conclusion, but, the case having arisen under Section 10(k), entered its work assignment order without prejudice to a representational election).

It has been noted that "cases in which both unions are certified by the Board and represent segments of the employer's work force and when the dispute is over an ambiguous area of representation . . . have been handled in the past as questions of the definition of bargaining units", Recent Cases, 71 Harv. L. Rev. 1364, 1366 (1958) (citing *Amalgamated Meat Cutters*, 101 N. L. R. B. 181 (1952) and *Local 26, Int'l Fur Workers*, 90 N. L. R. B. 1379)).

Respondent believes that the brief of the United States concedes that relief is available to petitioner here in a proceeding under Section 9: "the Board will decide the former type question [unit coverage] in a Section 10(k) proceeding, and *vice versa*. *Cf. Cleveland Pneumatic Tool Co.*, 142 N. L. R. B. No. 48, 53 LRRM 1025, with *Gas Service Company*, 140 NLRB No. 45, 52 LRRM 1037. See also *Newark & Essex Plastering Co.*, 121 NLRB 1094, 1109, n. 37" (SGB 23, n. 22).

IV. ALL THE POLICIES OF THE ACT BEARING ON THIS CASE SUPPORT THE RESULT BELOW

Respondent submits that the Act, taken as a whole, evidences a scheme of rights, obligations and procedures with which the relief sought by petitioner is completely inconsistent.

A. The Rights of the Engineering Laboratory Employees and Respondent's Pervasive Duty of Neutrality: Sections 7, 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1) and 8(b)(2)

Section 7 of the Act, its first substantive section, guarantees to employees the right to bargain collectively through representatives of their own choosing and to refrain from exercise of such right except to the extent that the right to refrain may be affected by a union shop agreement permitted by Section 8(a)(3), *viz.*, a union shop agreement which, among other things, runs in favor of a labor organization which is the representative of the employee as provided in Section 9(a) in the appropriate collective bargaining unit covered by the agreement containing the union shop clause. The employees of the engineering laboratory did not vote in the election in which IUE was chosen as representative of the production and maintenance unit, were not represented by IUE in the bargaining resulting in IUE Agreement and would not be represented in the contract arbitration which petitioner seeks in this proceeding. Such employees voted in the election in which Federation was chosen as representative of the salaried technical unit and were represented by Federation in the bargaining resulting in the Federation Agreement. It seems inconceivable that IUE should be able to obtain status as their bargaining agent and have the IUE Agreement applied to them by means of an arbitration award under the IUE Agreement. Respondent is legitimately concerned with protecting the statutory rights of these employees as a matter of company policy, as a matter of its statutory obligations and as a matter of avoiding liability to them. Neither opposing brief even mentions Section 7 or the rights or interests of the present employees of the engineering laboratory.

Sections 8(a)(1) and (3) forbid an employer to interfere with the exercise by its employees of the rights guaranteed them in Section 7 or to discriminate against an employee to encourage or discourage membership in any given union. Accordingly, respondent must be completely neutral in so far as the engineering laboratory employees may have exercised or may hereafter exercise their right under Section 7 to choose between the IUE and the Federation as their bargaining representative. Section 8(a)(2) forbids an employer to support any union, and respondent therefore may not lawfully assist either IUE or Federation to achieve representational status with respect to engineering laboratory employees. Indeed, an employer may not even recognize a union which has not established its majority status in respect of the employees involved; *ILGWU* v. *NLRB* 366 U. S. 731. How can respondent fulfill its pervasive obligation of neutrality? By vigorously defending the status quo in the arbitration proceeding petitioner seeks? By defaulting to petitioner's demands? By refusing to abide by an arbitration award? Until NLRB settles the matter, to the extent to which employees are not at work in the engineering laboratory because of their IUE status or their Federation status, has respondent discriminated against them in violation of the Act, thereby giving rise to claims for back pay?

Sections 8(b)(1) and 8(b)(2) forbid a labor organization to restrain or coerce the employees (or cause an employer to do so) in the exercise of their rights under Section 7. In a union shop situation, would not the relief IUE seeks from the arbitrator in this case tend to force the affected employees into the aggressor union in order to have some chance of saving their jobs (a compulsion only permissible if such union is the majority representative of a unit which, ***under the standards of Section 9***, includes such employees)?

B. The Duty to Bargain Collectively with the Majority Representative of an Appropriate Unit of Employees: Sections 8(a)(5) and 8(b)(3)

Section 8(a)(5) forbids an employer to refuse to bargain collectively with the representatives of his employees (subject to such representatives having been designated as such by a majority of the employees in an appropriate unit). Section 8(b)(3) conditions a union's duty to bargain collectively with an employer on the union's being the majority representative of such a unit of employees. If the production and maintenance unit should be deemed by the arbitrator under the IUE Agreement to include the engineering laboratory but thereafter be determined by an arbitrator under the Federation Agreement to exclude it, where would the IUE, the Federation and respondent stand in their obligations to bargain collectively? NLRB's eventual determination, necessarily inconsistent with that of one of the contract arbitrators, would, unless respondent correctly anticipates the agency decision, determine that respondent had breached its statutory duty in the interim.

If respondent should, pursuant to an award in a bi-lateral collective bargaining agreement arbitration, improperly (in the view of NLRB) recognize IUE in respect of the engineering laboratory instead of Federation (or vice versa), thereby committing an unfair labor practice, it is no defense that the recognition was made in good faith reliance upon the award even if respondent had resisted recognition vigorously before the arbitrator. See *Combustion Engineering Co.*, 86 N. L. R. B. 1265 (1949) and *UAW, Local 291*, 92 N. L. R. B. 968 (1950).

C. The Cornerstone of the Labor Relations Scheme of the Act Creating an area in which NLRB's Dispute Resolving Jurisdiction Preempts a Collective Bargaining Agreement Arbitration: Section 9

Section 9 requires that employees be grouped in appropriate units for bargaining purposes and provides that a majority of the employees in such a unit shall have the right to designate the bargaining representative for all the employees included. It further entrusts to NLRB a special function in determining the propriety of bargaining units "to assure to employees the fullest freedom in exercising the rights guaranteed" by the Act. References to, and requirements for, certification under Section 9 in respect of an appropriate unit are spread throughout the Act and the vast majority of the rights and obligations created by the Act depend upon compliance with Section 9. Section 9 and the NLRB functions thereunder seem fundamental to the entire scheme provided by the Act. Section 9 itself envisions inter-union rivalry, both in unit determinations and in elections, and accords to the expert agency the duty of final and universally binding determinations in this most sensitive area.

The NLRB discretion under Section 9 is the broadest conceivable administrative discretion. *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, and the over-all inference seems clear that disputes as to the coverage of units previously prescribed by NLRB and as to representational status were intended to be entrusted solely to NLRB. Indeed, an NLRB determination under Section 9 is not directly reviewable by the courts of appeals but can only be called into question in an enforcement proceeding with respect to a cease and desist order under Section 8; *AFL* v. *NLRB*, 308 U. S. 401; see also *Leedom* v. *Kyne*, 358 U. S. 184.

In the face of this, the opposing briefs argue (PB 17-20 and SGB 28-30 and 32-33) that Section 301 grounded arbitration of the instant dispute should be directed because (a) encouragement of collective bargaining necessarily requires encouragement of voluntary recognition, (b) if IUE were uncertified, it could obtain relief here only by petitioning for an election under Section 9 and the recognition clause of the collective bargaining agreement would involve only the intentions of the parties, (c) the contract grievance may be broader than the issues which NLRB can resolve under Section 9 and (d) NLRB would (or might) accept the award of the collective bargaining agreement arbitrator who, of course, would render his decision on the same federal law criteria which would govern agency decision.

The arguments founded on problems arising from voluntary recognition in uncertified units are far afield for this case has nothing to do with an employer's willingness to recognize absent certification or the enforceability of a collective agreement with an uncertified union or the necessity for verification of an uncertified union's majority status before agency clarification of its appropriate unit. As NLRB has noted "an employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of the unions until its right to be recognized has finally been determined under the special procedures provided in the Act", *Novak Logging Co.*, 119 N. L. R. B. 1573, 1574 (1958); see also *Midwest Piping and Supply Co.*, 63 N. L. R. B. 1060 (1945). In any event, both unions here are recognized pursuant to NLRB certifications and both are certified as representatives of workers in mutually exclusive units. Any adjudication of the scope of one unit necessarily affects the scope

of the other (and respondent can hardly "voluntarily" recognize both unions in respect of the engineering laboratory and its employees). It seems clear that the Act encourages voluntary recognition or readjustment of status thereunder only to the extent that the statutory rights of others are not thereby prejudiced.

While there is no requirement that bargaining be in the most appropriate unit or in the unit that the NLRB would have defined in the first instance, the IUE cannot thereby justify an attempt to modify the agency-defined unit of a third party not party to the IUE Agreement or to the arbitration demanded.

Petitioner urges recognition of private agreements because the parties are most "expert in their mutual determination as to what arrangements are appropriate to their needs (PB 18)". But in realizing the benefits of its collective expertise with respondent, IUE necessarily denigrates the similar collective expertise of Federation and respondent. The exclusive expertise of NLRB is certainly the intended method of resolving such disputes, at least absent an agreed upon method of resolution between all the real parties in interest, i.e., including Federation.

While a representation election is a condition precedent to the availability to an uncertified union of a "motion to clarify" under Section 9, it is difficult to find therein factors promoting industrial strife. The mere fact that "an established relationship" is reaffirmed on the basis of an NLRB certification is not of itself a source of strife and the reasoning of NLRB in declining to render clarifications of the scope of units defined solely by contract seems relevant here. In *Bell Telephone Co. of Pennsylvania*, 118 N. L. R. B. 371, 374-75 (1957), NLRB said:

> "We cannot believe that Congress, having specifically provided an effective procedure for defini-

> tive resolution of unit issues in Section 9(c)(1), at the same time intended to authorize the Board to derogate from that procedure in cases of this type by giving an advisory opinion which is not binding upon the parties or the Board, and where if one of the parties is dissatisfied with the Board's view, it could file a petition at an appropriate time covering all employees in the unit or a refusal-to-bargain charge seeking to obtain a redetermination of the status of the employees involved."

The arguments that Section 9 relief in representation disputes should not be exclusive because the contract grievance claim may be broader than the Section 9 issues, thus either depriving one of the rival unions of a forum in which to press all its claims or requiring two or more proceedings to realize a full remedy, are founded on hypothetical situations not responsive to the facts of this case for here the contract claim, however characterized, is no broader than the issue which would be submitted to NLRB under statutory procedures. If IUE is ultimately successful in its present claims, the engineering laboratory operations would, so far as labor relations are concerned, have to be integrated into the production and maintenance unit operations in respect of which the IUE Agreement and the applicable local supplement were drafted. The skill of the salaried technical machinists in the laboratory would, under Section XII (pp. 30-36) of the IUE Agreement, have to be weighed against the seniority of those presently represented by IUE. If new job classifications should be required, new agreements would have to be reached because the arbitration clause of the IUE Agreement withholds from the arbitrator the power to establish or modify job classifications (Section XIV-A. D (2), p. 43). All these specific controversies can arise if IUE is successful in the bi-lateral arbitration it seeks, and, should NLRB, when eventually faced with the

basic dispute, disagree, all prior contract arbitrations will have proved to be for naught.

The assertion that, in disputes of the present type, it is simpler and more expeditious to submit all the questions to a contract arbitrator does not seem to be grounded in realities, at least the realities of this case. If IUE is successful in its underlying claim here (whether before NLRB or the arbitrator under the IUE Agreement) there will come into existence the raw material for a host of individual arbitrations. The panoply of issues under the IUE Agreement allegedly more expeditiously settled by the contract arbitrator cannot be put before him in the instant grievance and, in any event, are all dependent upon the fundamental question of unit coverage (much as, in *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173, the question of the availability of state remedies was dependent upon a question of status).

Thus, the instant dispute almost inevitably will create the necessity for several further determinations and, since the rights of third parties are involved, must finally go to the NLRB whose adjudication may give rise to further contract arbitrations, proliferating the fragmentation of decision which the initial contract arbitration is, according to the opposing briefs, supposed to forestall. It clearly seems more complicating, more fragmenting, more aggravating, more time consuming (and *highly futile*) to postpone NLRB resolution. In the very situation envisioned in the brief of the United States (pp. 29-30) holders of disputed jobs transferred from one unit to another and, in the new unit, junior to other employees and hence subject to lay-off), there is not the slightest possibility of avoiding fragmentation of adjudication and a prolonged series of separate controversies. The engineering laboratory employees themselves could file unfair labor practice charges

alleging that their lay-offs were on account of their Federation membership. Even in the unlikely event that the Federation would follow the arbitration award interpreting the IUE Agreement as determinative of its rights, it cannot be seriously suggested that the laid-off employees ousted from their jobs would accept such an award.

The argument that the arbitration sought here could not result in conflict with the eventual NLRB determination of the IUE-Federation dispute because the agency will (according to petitioner) or might (according to the brief of the United States) defer to an arbitration award under the IUE Agreement is, or ought to be, unsound. The NLRB current policy of acceptance of arbitration awards has consistently been stated by the agency as totally inapplicable where a person whose rights were adversely affected was not party to the arbitration proceeding. See *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955); *Int'l Hod Carriers Union, Local 231*, 91 N. L. R. B. 598 (1950); *Int'l Longshoremen's and Warehousemen's Union*, 94 N. L. R. B. 388 (1951); *Local 825, Int'l Union of Operating Engineers*, 137 N. L. R. B. 1425 (1962).

Raley's Inc., 143 N. L. R. B. No. 40 (1963) is not to the contrary. When Raley's first hired full-time janitors and bottle-sorters it contracted with Building Service Employees as representative of the "new" unit. Retail Clerks, for some years the representative of all Raley's non-supervisory employees (other than meatcutters), objected and filed unfair labor practice charges alleging that the employer had assisted and dominated Service Employees. NLRB decided that Service Employees did not represent a majority of the janitors and, by settlement, it was agreed that the contract between Raley's and Service Employees was void and that Raley's would not recognize Service Employees as representative of the janitors absent certification. Raley's submitted to arbitration with Retail Clerks

whether the janitors and bottle-sorters were covered by the contract between them and the arbitrator ruled that they were. Service Employees then petitioned for a representation election among the janitors and bottle-sorters and NLRB dismissed the petition.

NLRB first stated that arbitration awards are considered by it when they meet the established tests of fairness and regularity. It went on to say: "It is true, of course, that under Section 9 of the Act the Board is empowered to decide questions concerning representation. However, this authority to decide questions concerning representation *does not preclude the Board in a proper case from considering an arbitration award in determining whether such question exists*" 1963 Daily Labor Report No. 128, p. D-2 (emphasis supplied). Accepting the award as the definitive interpretation of the *contract* between the parties, the "contract bar" rule (established by the agency to give effect to the policy favoring stable employer-union relations) required dismissal of Service Employees' petition for a representation election.

While Service Employees as a rival union and the janitors affected were not parties to the Retail Clerks' contract arbitration, neither was Service Employees the representative of any of the employees in question, since NLRB had earlier found that that union had been unlawfully assisted as a result of the company's extending recognition by agreement. Federation bears no such stigma, having been certified by NLRB as the representative of the salaried technical unit by virtue of an election in which the engineering laboratory employees voted.

Nor is *Pacific Tile and Porcelain Co.* (137 N. L. R. B. 1358 (1962)) to the contrary. NLRB there dealt with challenges to the votes of several hundred employees in a representation election (most challenges questioning whether economic strikers were "employees" entitled to vote

and whether replacements were in fact permanent replacements and entitled to vote). Two employees had been discharged prior to the election and their discharges had been passing through the grievance channels until such procedures were suspended by an economic strike. NLRB decided to allow the grievance and arbitration proceedings to determine the status of the two workers at the time of election. While the arbitrators' award could affect the final determination of the representation question, the arbitrator clearly was not determining a "representation issue".

The brief of the United States also seems to say (citing *Lincoln Mills, supra*) that collective bargaining agreement arbitrators will, when called upon to clarify NLRB certified units, apply the same criteria as those which govern the agency under the Act. While the right to arbitrate is, by virtue of Section 301, governed by the nascent body of federal law to be shaped by the courts in light of the overall scheme of federal labor relations legislation, an arbitrator clearly is not bound by "federal law". *Lincoln Mills* lays down rules for courts not for arbitrators and most arbitrators hold themselves unbound by "law", including in respect of the very matters in issue here; see *National Steel & Shipbuilding Co.*, 40 Lab. Arb. 625 (1963) and *Long Island News Corp.*, 35 Lab. Arb. 840 (1960). Arbitrators have noted that arbitration between one rival union and the employer of a work assignment dispute is undesirable, since they are really controversies between unions and bi-lateral awards only provoke grievances from the other union and fail to resolve the overall problem; see *Rayonier, Inc.*, 36 Lab. Arb. 883, 887 (1961). But when a collective bargaining agreement arbitrator is forced to do so, he typically conceives his function as one of pure contract interpretation (however sterile this approach to the problem may be); see *Houdaille Industries, Inc.*, 35 Lab. Arb. 455, 459 (1960).

D. Special Implications as to Representation Disputes: Section 10(a)

Section 10(a) provides that the power of NLRB to prevent unfair labor practices shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

The omission of any statement of the ultimately controlling authority of NLRB in the determination of units and the certification of bargaining representatives (except in the indirect sense that such matters may be in issue in unfair labor practice cases under Section 8(a)(5) and 8(b)(3)) hardly supports an inference that the agency's power under Section 9 *can* be affected by "other means of adjustment . . . established by agreement." The better inference seems to be that reference to NLRB authority as paramount to all other sources of authority in unit determination and certification matters would be superfluous because orderly procedure would not permit any competing adjudication.

E. Congressional Mandate for Protection of Employers and for Final and Binding Resolution of Inter-Union Disputes: Sections 8(b)(4), 10(k) and 303

Sections 8(b)(4) and 303 very clearly and forcefully attempt to protect an employer from the consequences of inter-union strife. They evidence a strong Congressional declaration that it is basically unfair for one union to attempt to carry the day against another union by assaulting the employer. As Sections 8(b)(4)(B) and (C) emphasize, this is particularly so when the union whose jurisdiction is being attacked is, but the aggressor union is not, the certified representative of the employees in issue. Congress has said that employers should be able to rely on NLRB certifications and unit determinations (as respondent did in entering into the IUE Agreement and the Federation Agreement, in each case agreeing to recognize the union for the units for

which it was certified by NLRB) *without harassment by any union discontent with its certification.* The reversal of the decision below, far from implementing that policy, would directly flaunt it by exposing respondent to a variety of direct and indirect injuries flowing from petitioner's quarrel with the Federation.

Petitioner (PB 17) suggests that the power of the courts under Section 303 to award tort damages for violation of Section 8(b)(4) indicates that it was not intended that the judicial jurisdiction under Title III was to be ousted by NLRB authority under Section 10(k). Putting aside petitioner's unwarranted focus on Section 10(k), it seems clear that while Section 303 gives a right to recover damages not available in an NLRB proceeding, it does not grant the courts (who award damages) the opportunity to duplicate the correlative administrative remedy (injunctive relief). Though the illegality of the acts sued upon in a Section 303 case is for the courts and not dependent upon an NLRB finding, *Int'l Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237, even conflicting awards by the court and the agency do not place the employer in the untenable position respondent would find itself here in the event of conflicting awards. Furthermore, Section 10(k) takes cognizance of situations not covered by Section 303 for the mere threat of conduct in violation of Section 8(b)(4), which would trigger agency action under Section 10(k), does not create a cause of action under Section 303, *Haspel* v. *Bonnoz, Singer & Hand Embroiderers Union*, 112 F. Supp. 944 (S. D. N. Y. 1953), and, in any event, such a threat would normally not give rise to damages.

The brief of the United States finds that Section 8(b)(4)(D), coupled with cases permitting employers to enforce no strike clauses under Section 301, demonstrates the inapplicability of the preemption doctrine here (SGB 14-15

and 25). The argument is that the strike in question may be cognizable by NLRB under Section 8(b)(4) and, since it is also cognizable by the courts (and contract arbitrators) under Section 301, there can be no greater reason to hold work assignment disputes and disputes over the coverage of certified units, to be within the exclusive jurisdiction of NLRB. This argument overlooks the fact that in the situations referred to there is neither actual nor potential inconsistency or any of the other undesirable consequences which would flow from reversal of the decision below. A no-strike covenant by a union can be violated and should be actionable whether or not the union's right to strike is also circumscribed by Section 8(b)(4)(D) and an arbitrator or a court may find a violation of the no-strike clause without the statutory legality or illegality of the strike being in issue. The true distinction between the cases cited in the brief of the United States and the present case is that the Section 301 adjudications there are the final and binding adjudications of contract issue which exists quite independently of any issue under Section 8(b)(4)(D), whereas in the present case the arbitrator's award (i) will be neither final nor binding but simply a first step, highly prejudicial to respondent, the employees affected and Federation, in the final and binding resolution which must eventually be made by NLRB and (ii) will purport to affect the NLRB determined units of IUE and Federation and the collective bargaining representation of the affected employees.

Section 10(k) provides that, upon a complaint that a union threatened to strike, or has struck, an employer to obtain a work assignment in violation of Section 8(b)(4)(D), NLRB shall hear and determine the work assignment dispute, unless within 10 days after notice of the filing of the charge the parties to the dispute submit to the agency satisfactory evidence that they have adjusted or agreed upon

methods for the voluntary adjustment of the dispute. Upon adjudication of the dispute by NLRB or its voluntary adjustment the agency is directed to dismiss the unfair labor practice charge.

While the opposing briefs emphasize the aspect of Section 10(k) favoring adjustment of disputes by the parties, it seems clear that, first and foremost, Section 10(k) reflects a Congressional policy that neutral employers shall be rapidly relieved of any sort of harassment from any union party to a work assignment dispute. Without conceding that the instant grievance should be treated as a "work assignment" dispute, respondent concedes that (i) a jurisdictional prerequisite to an NLRB work assignment determination is that at least a threat be made against the employer in violation of Section 8(b)(4)(D) (not an actual strike as stated in the opposing briefs) and (ii) it is undesirable that a union be forced to commit an unfair labor practice, however harmless, to obtain an NLRB work assignment determination. It does not thereby follow that Congress intended employers to be harassed by the demands of one of the rival unions for collective bargaining agreement arbitration, not binding on the other rival union.

The second important policy manifestation of 10(k) is that it is made obligatory on the Board to determine the dispute and even voluntary adjustment between the rival unions must come within 10 days in order to withhold such a determination. As the Court emphasized in *NLRB* v. *Radio and Television Broadcast Engineers*, 364 U. S. 573, Section 10(k) demands a *final and binding* resolution of a work assignment dispute. Interlocutory, inconclusive or procrastinating measures will not satisfy the urgent Congressional purpose. Certainly a contractual arbitration award between a neutral employer and the aggressor union, not in any way binding on the union under attack, does not

further that Congressional purpose and probably detracts from it.

The third clear policy emanation of Section 10(k) is that the adversaries in work assignment disputes should settle them or agree upon a method of settlement and, accordingly, such settlements and agreements should be encouraged in the overall federal labor scheme. Curiously, this policy emanation is relied upon by the opposing briefs in the face of their concession that the arbitration clause of the IUE Agreement does not constitute an agreed upon method for settling the present dispute within the meaning of Section 10(k). The concession, of course, is required by the obvious fact that Federation is a real party in interest in the dispute. Reversal of the decision below, far from encouraging the kind of agreements sought by Section 10(k), would affirmatively discourage them because an aggressor union will have nothing to lose and much to gain by seeking a collective bargaining agreement arbitration award of the work in question to the great prejudice of the rival union and solely at the expense of the employer. Indeed, the best method of encouraging the kind of work assignment agreement Congress saw as the only alternative to an agency determination of a work assignment dispute would be to refuse to permit the aggressor union to gain, however temporarily, any advantage from a collective bargaining agreement arbitration with the neutral employer.

F. Encouragement of Final and Binding Settlement of Inter-Union Disputes by Agreement between the Rival Unions: Sections 201, 203(d) and 301(a)

Sections 201, 203(d) and 301(a) evidence, and it has always been acknowledged by respondent in this case, a very clear and strong Congressional purpose favoring (i) resolution of "issues between employers and employees" by collective bargaining (Section 201(a)) and (ii) "[f]inal

adjustment by a method agreed upon by the parties . . . of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" (Section 203(d)). But the subject matter of this pervasive policy is labor-management relations, not relations between two rival unions and not disputes between two rival unions and the objective is a "final adjustment" of grievance disputes, not a non-binding interlocutory adjustment.

Where in these sections is the policy favoring arbitration under the IUE Agreement of a dispute which truly is between IUE and Federation, giving rise to an award which cannot bind the affected employees and Federation and which, far from being final, is precipitous of further controversy and further adjudications?

More relevant to this case is the policy reflected in Section 301(a), *viz.*, that agreements between labor organizations in respect of their interrelationships and disputes shall be enforceable and shall be governed by federal law. Congress clearly meant to encourage settlement of inter-union rivalries by inter-union agreements. While inter-union agreements may not affect the statutory rights of employees, they are certainly helpful in moderating inter-union rivalries. It does not seem to encourage such agreements to permit one rival union to gain strong tactical advantage over another through the device of a bi-lateral arbitration award interpreting the aggressor's collective bargaining agreement with the employer.

As the *Steelworkers* cases, *supra*, noted, arbitrations pursuant to collective agreements have a high place in the Congressional scheme for labor relations because such arbitrations are final and binding on the parties in interest and serve to allay industrial tensions and reduce industrial strife. This being the judgment embodied in Sections 201, 203(d) and 301, how can those Sections be read as decisive in re-

spect of the enforceability of a demand for an arbitration which cannot further the end result intended and, in fact, is antagonistic to that result?

To avoid the obvious dis-service to the Congressional policies relied on, the brief of the United States (SGB 19-20) suggests that perhaps the arbitrator under the IUE Agreement could force Federation into the proceedings so that it would be bound by the award (citing *National Steel & Shipbuilding Co.*, 40 Lab. Arb. 625 (1963)). But the *Steelworkers* cases teach that, under the scheme provided by the Act, the duty to arbitrate must be based on the consent of the parties—Section 301 provides for the enforcement of *agreements*. Federation has never agreed to arbitrate its jurisdictional differences with IUE (and it is interesting to note that IUE does not suggest that Federation be interpleaded) and any suggestion of non-consensual arbitration under the Act is patently unsound.

V. THE PRE-EMPTION CASES SUPPORT THE RESULT BELOW

The opposing briefs dismiss the pre-emption doctrine as nothing more than the proposition that the ". . . Act precludes the application of State statutes and common law doctrines regulating the conduct of employers, employees, and their representatives apart from a collective agreement. . . ." (SGB 8) (see also PB 12).

The quoted description of the pre-emption doctrine expresses the result reached from application of the doctrine but does not advert to its underlying principle, focus on which is necessary to apply the doctrine in novel situations.

A. The Principle Underlying "Pre-emption" Cases

While *Garmon* and related "pre-emption" cases certainly support the frequently articulated proposition that

States are not free to act in respect of conduct which is arguably protected or prohibited by Sections 7 and 8 of the Act, they also expose the underlying *principle* of the pre-emption doctrine. It is not an independent judge-made proposition, but a judicial effort to give effect to legislative intent. The basis for the rule of *Garmon* and similar cases is a necessary inference from the Act either that Congress specifically did not intend the particular type of controversy over which another forum seeks to exercise jurisdiction to be resolved by such processes (whether judicial or administrative) or that, in light of the over-all scheme contemplated by Congress, a proper allocation of powers among the various institutions concerned with labor relations excludes action in a particular type of case by other than NLRB.

As Professor Summers of the Yale Law School recently stated to the ABA Labor Relations Law Section:

> "The central question in every pre-emption and primary jurisdiction case must be, what roles did Congress intend should be played by the various legal institutions in handling this particular matter?" (Daily Labor Report No. 168, Aug. 28, 1963, p. 3).

Accordingly, the pre-emption cases are relevant here to discern the type of situation which gives rise to an inference of NLRB exclusivity and to evaluate the instant case on that basis.

B. The Pre-emption Doctrine and Section 301

Professor Summers' paper, referred to above (which is shortly to be published) relates the pre-emption doctrine, analyzed in terms of the overall intent of the Act, to the questions left open by *Smith v. Evening News*.

> "The cases of this Term make clear that the *Garmon* formula ["arguably protected or pro-

hibited"] cannot bind the many brambles of pre-emption and primary jurisdiction. Indeed, when applied other than to protect unions in their use of economic force from state restrictions, the *Garmon* formula may impale us on the terms. Three examples are enough. In *Smith* v. *Evening News*, individual employees brought suit claiming that their employer had violated the provision in the collective agreement prohibiting discrimination for union activity. The Michigan court, dutifully applying *Garmon*, held that because the conduct alleged was an unfair labor practice, exclusive jurisdiction was in the NLRB. The Supreme Court reversed baldly declaring that *Garmon* had no application in such cases. Said the Court:

> "'The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301.'

The soundness of the Court's result only underlined the inadequacy of [the] *Garmon* [formula], and though we are not told the premises from which the Court proceeds we know that the premises are not those articulated in Garmon. . . .

"These three cases [Professor Summers' discussion of *Incres Steamship Co.* v. *I. M. W. U.*, 372 U. S. 24, and *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746, are omitted from this excerpt since they involve pre-emption problems not directly relevant here] lay bare the immediate source of our difficulty —not all preemption problems are of the same piece and not all can be resolved by a single formula . . .

"The problems of preemption and primary jurisdiction have as their common source the complex process of allocating governmental powers and functions among federal and state authorities, and among

courts and administrative agencies. In the area of labor relations with which we are concerned, the making of this allocation rests ultimately with Congress. The central question in every preemption and primary jurisdiction case must be, what roles did Congress intend should be played by the various legal institutions in handling this particular matter. . . . Determining the allocation intended by Congress is not always a simple process for Congress frequently fails to address itself directly to the problem. The courts must then make the allocation which, with due regard to the federal system, will best comport with the structure of the statute and fulfill the various purposes of Congress. The inquiry, therefore, cannot be directly into how Congress intended to allocate powers. In most cases that is a will-o'-the-wisp. Rather, the critical inquiry is what allocation by the Court will achieve the substantive results sought by Congress. . . .

". . . .

". . . In *Smith* v. *Evening News,* the problem is one of allocation between courts and the NLRB, both acting as instrumentalities of the federal government applying federal law. Considerations of federalism do not enter, and the question might be cast in more positive terms of how the roles of these agencies can be coordinated to best achieve the purposes of Congress. There are, however, two bodies of substantive rules, those of the statute and those of the collective agreement. We are again confronted with the problem of allocation of power to make the applicable rules. But the Congressional preference here is clear and strong. One of the central purposes of the Act is to create a structure of private regulation through the collective agreements. That purpose is fulfilled only if the substantive rules and procedural devices established by the parties are applied. The private processes are preferred and should have full play unless they clearly contravene substantial policies of the Act. And even where these private

processes, which are themselves the fulfillment of Congressional policy, contravene other policies there remains the question of what allocation of powers and functions will achieve in largest net measure the various policies of the Act. This analysis solves easy cases like *Smith* v. *Evening News*, but gives at most some general guides for more difficult cases like *I. B. E. W.* v. *Raytheon* which the Court narrowly escaped confronting by the fortuitous settlement of the parties." [Bracketed material supplied by respondent]

C. Factors Relevant to Whether Congress Intended NLRB Exclusivity

1. Adjudications of Status under the Act Consistently Held Within Exclusive Jurisdiction of NLRB

Decisions in favor of NLRB pre-emption invariably result where the competing forum would be called upon to adjudicate a fundamental statutory status, *e.g.*, certification as a collective bargaining representative (*Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767 (arising under the Wagner Act)), propriety of units and certification of their collective bargaining representatives (*LaCrosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18), status of a union as a "labor organization" within the meaning of the Act (*Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173) or whether a workman is an "employee" or a "supervisor" within the meaning of the Act (*Local No. 207, Int'l Ass'n of Bridge Workers Union* v. *Perko*, 373 U. S. 701).

Those threshold questions under the Act must, it is inferred, be decided nationally on a uniform basis by the specially expert federal agency charged with the overall implementation of statutory policy. Questions of status under the Act, particularly certification as bargaining representa-

tive of an appropriate unit of employees, are fundamental to the entire complex of statutory rights and obligations and their resolution gives rise to far-reaching consequences under the statutory scheme. It is therefore inferred that all such resolutions are much more likely to have been intended by Congress to be within the exclusive province of its expert agency (in contrast to the inference appropriate in the case of resolution of the kind of *ad hoc* issue which arises from conduct which may give rise to the relatively routine unfair labor practice complaint, such as whether employees X, Y and Z were discharged because of union activity and hence entitled to reinstatement and back pay).

2. Adequacy of Administrative Remedy Supports Inference that Dispute Within Exclusive Jurisdiction of NLRB

In *Garner* v. *Teamsters Union*, 346 U. S. 485, the Congressionally-provided remedies against coercive picketing were found adequate and, hence, to preclude state relief against the same conduct notwithstanding the fact that the state scheme was virtually identical with that established by the Act. See also *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (absence of damage remedy under the Act supports inference that Congress did not intend to preclude damage action under state law) and *Int'l Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (where NLRB action under Act capable of awarding back pay to employee illegally expelled from the union but state law also provided for reinstatement, it should not be inferred that Congress intended to deprive the employee of the latter remedy).

3. Interest of Other Institutions in Ordering Conduct in Labor Dispute Bears on Congressional Intention as to NLRB Exclusivity

The strength of the interest of the competing institution (*e.g.*, the strong State interest in preventing violence

and protecting property), is relevant to whether the Act should be read as reflecting an intention to permit vindication of the interest in fora other than NLRB. See *Allen-Bradley Local No. 1111, United Electrical Workers* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (arising under the Wagner Act). *Internat'l Union, U. A. W.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245; *U. A. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266. Where such interest is relatively weak as opposed to the public interest in nationally uniform and coherent implementation of the substantive policies of the Act, NLRB exclusivity should be inferred (see *Weber* v. *Anheuser-Busch Inc.*, 348 U. S. 468).

4. Attitude of NLRB toward Exercise of its Jurisdiction Irrelevant to Whether such Jurisdiction Exclusive

The fact that NLRB may decline to exercise admitted jurisdiction over labor disputes does not warrant an inference of Congressional intention to permit other institutions to determine such disputes; *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 and *Amalgamated Meat Cutters Union* v. *Fairlawn Meats, Inc.*, 353 U. S. 20.

D. The Foregoing Criteria Support a Strong Inference that Congress Intended the Instant Dispute to be Determined Solely by NLRB

As has been shown in the preceding sections of this brief, (i) the dispute in the instant case raises a fundamental issue as to the status of IUE as opposed to the status of Federation as bargaining representative of the engineering laboratory employees and as to the content of the two NLRB determined units involved, (ii) the Act provides an adequate

means for the resolution of this dispute and for according to IUE the ultimate relief it seeks and (iii) collective bargaining agreement arbitration, as an institution in the Congressionally conceived scheme of national labor relations, has no interest in resolving inter-union disputes, whereas the public interest in a final resolution, which only NLRB can provide, binding on both unions and protecting the rights of affected employees is enormous. NLRB's position (SGB 31) that arbitration under the IUE Agreement might (fortuitously) lighten its case load, or temporarily postpone an increase in its case load; is irrelevant.

Whether or not, strictly speaking, the result below should be expressed in terms of "preemption", the preemption cases provide a forceful analogy supporting affirmance. Without reliance on any "doctrine" the decision below should be affirmed on the basis that the overall scheme of the Act requires that the instant dispute be resolved by NLRB to the exclusion of an arbitrator under the IUE Agreement.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the judgment below should be affirmed.

JOHN F. HUNT, JR.,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Attorney for Respondent

JAMES F. SMITH,
3 Gateway Center,
Pittsburgh 30, Pa.

CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York 5, N. Y.
Of Counsel.

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